Supreme Court of the United States.

DECEMBER TERM, 1867.

No. 120.

THE UNITED STATES, *Appellants*,

vs.

JOSIAH F. CROSBY ET AL.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF FOR APPELLEES.

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THE UNITED STATES, Appellants, *vs.* JOSIAH F. CROSBY, SIMEON HART, HENRY S. GILLETT, JOHN S. GILLETT.	Appeal from the Supreme Court of the Territory of New Mexico.

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STATEMENT OF THE CASE.

The proceedings in this case, were instituted in the District Court of the United States for the Third Judicial District of the Territory of New Mexico, at the November Term, 1865, under the act of Congress, entitled "*An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes,*" approved July 17, 1862 (12 Statutes at Large, 589,) by Libel of Information against certain real estate described therein, situated in the county of El Paso, State of Texas, the property of the said Josiah F. Crosby, Simeon Hart, Henry S. Gillett and John S. Gillett, of said county and State; which property was seized by Abraham Cutler, United States Marshal for the District of New Mexico, as Captor.—(Record, pp. 1, 2, 3, 4, 9, 10.)

A monition in said cause, was issued by the Clerk of said Court, which was returned by the Marshal, at said Term.—(Record, pp. 4, 5, 6.)

The Marshal, at said Term of said Court, filed therein his proclamation which had been published in the Santa Fé Weekly Gazette, for three successive weeks, "admonishing and summoning all persons claiming any interest in said property, or knowing or having any thing to say why the same should not be decreed to be forfeited to the United States, and be condemned and sold to answer the prayer of said libel, that they be and appear before said District Court, at the Court House, in La Mesilla, in said District, on the 6th day of November, A. D., 1865, at 10 o'clock, A. M., when and where said cause will be heard, and then and there to interpose their claims, and answer said libel, and make there allegations in that behalf."—(Record, pp. 10, 11.)

At the same Term of the Court, John S. Gillett, claimant to a portion of said property, and Henry S. Gillett, claimant to a portion thereof, each, filed in open Court, a bond with sureties, for the payment of the costs in said suit; which bonds were approved by the Clerk.—(Record, pp. 6, 7, 8.)

The said cause coming on to be heard, the Counsel for the said claimants moved to quash the monition, return of the Marshal, and the publication in the case, for reasons set forth in said motion. The Court overruled the said motion. The said claimants, by their Counsel, excepted to the opinion of the Court, in overruling the said motion, and tendered their bill of exceptions which was signed and sealed by the Court.—(Record, pp. 8, 9.)

Afterwards, the said claimants, by their Attorneys, in open Court, asked leave of the Court to file their claims to the property libelled in said cause. To the filing of said claims, the United States, by their District Attorney, objected, and the Court *sustained* the objection.) Whereupon, the Attorneys for the said claimants, excepted to

the opinion of the Court, and asked the Court to sign a bill of exceptions, which was *refused* by the Court.

The Attorneys for the said claimants, then, offered to file a plea to the jurisdiction of the Court, in the cause. The District Attorney objected, and the Court sustained the *objection*. The said Attorneys excepted to the opinion of the Court, in refusing said plea to be filed, and asked the Court to sign a bill of exceptions, which the Court *refused* to do.

Whereupon, C. P. Clever, Esq., one of the said Counsel, appeared and stated that he appeared for the said claimants of the property libelled, and was ready to show cause why the said property should not be condemned as forfeited. The Court *refused to permit any appearance of the said claimants of the said property.*—(Record, p. 12.)

The Court, then, "ordered, adjudged, and decreed, that a decree by *default*, be entered in the case, and that testimony be taken before a Commissioner, to be reported at the present Term of this Court."—(Record, p. 12)

Testimony was accordingly taken before a Commissioner, and reported to the Court.—(Record, pp. 12–17.)

And, thereupon, the presiding Judge of said Court rendered a final decree in said cause, whereby the said real estate, libelled as aforesaid, was condemned as forfeited to the United States, and the same was ordered to be sold by the United States Marshal for the District of New Mexico—*one-half* of the proceeds of such sale, *after the deduction and payment of all fees and costs* accruing in said case, *to go to the said Marshal*, Abraham Cutler, as *informant*.—(Record, pp. 17, 18.)

Afterwards, the Attorneys for the said claimants appeared in said Court, at the Term aforesaid, and asked the Court for an appeal to the Supreme Court of said Territory, in said cause. To their appearance for this purpose, the District Attorney objected, which objection was sustained by the Court.—(Record, p. 18.)

At the January Term, 1866, of the Supreme Court of the Territory of New Mexico, the said claimants, by their Attorneys, appeared, and moved the said Court for leave to file an appeal in said cause, a transcript of the record in the Court below, having been filed; which said leave was granted by the Court.—(Record, pp. 1, 19, 20.)

Whereupon, the said appellants, by their Attorneys, filed in said Court, their assignment of errors.—(Record, pp. 20, 21.)

And the District Attorney filed his joinder in error.—(Record, p. 21.)

The Attorney of the United States moved the Court to dismiss the appeal, because there was *no appearance* in the Court below, and because the judgment below, was by *default;* which motion was overruled by the Court.—(Record, p. 21.)

And, thereupon, the said Supreme Court "ordered, adjudged, and decreed, that the judgment and decree in the Court below, be, and hereby is, reversed and annulled, and this cause be remanded to the District Court for the county of Dona Ana, to be by the said Court, dismissed for the want of jurisdiction in the said Court, over the real estate in the county of El Paso, Texas, libelled in this cause, at the costs of the United States."—(Record, pp. 21, 22.)

From the said decision, the Attorney of the United States took an appeal to this Court.—(Record, p. 22.)

Points and Authorities.

Omitting all reference to many of the manifest errors appearing in the record of the proceedings of the said District Court, in this cause, the following points and authorities are submitted for the Appellees:

I. The District Court of the United States for the Third Judicial District of the Territory of New Mexico,

had no jurisdiction whatever over the real estate in the county of El Paso, Texas, libelled in this cause. The only legislation which confers on said Court, any jurisdiction in the county of El Paso, Texas, is contained in an act of Congress, approved March 3, 1863, entitled "*An Act to facilitate the Collection of the Revenue in El Paso County, Texas, and in the Territory of New Mexico,*" (12 Statutes at Large, 761,) which act is in these words:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the tenth section of an act entitled 'An act making appropriations for the legislative, executive and judicial expenses of the Government for the year ending thirtieth of June, eighteen hundred and fifty-eight,' approved March third, eighteen hundred and fifty-seven, be, and the same is hereby, repealed; and the act entitled 'An act creating a collection district in Texas and New Mexico,' approved August second, eighteen hundred and fifty-four, is hereby revived and re-enacted; *Provided,* That the collector shall reside at El Paso, Texas, instead of Frontera.

"SEC. 2. *And be it further enacted,* That the jurisdiction of the district court of New Mexico shall extend over the citizens of El Paso county, Texas, only in cases not instituted by indictment, and the trial and proceedings for violations of the revenue laws in said district court of New Mexico, shall be the same as in other district courts of the United States invested with admiralty powers; and this act shall take effect from and after its passage."

The 3d section of the act of Congress approved August 2, 1854, (10 Statutes at Large, 335,) which act is revived and re-enacted by the 1st section of the act above quoted, provides as follows:

"SEC. 3. *And be it further enacted,* That the District Court for the Territory of New Mexico shall have and exercise jurisdiction over all cases which shall arise in the Collection District of Paso del Norte, in the administration of the revenue laws, in the same manner, as if the said district was entirely within the Territory of New Mexico."

The foregoing legislation, while it extends the jurisdiction of the District Court of New Mexico, over the *Citizens* of El Paso county, Texas, in certain *Revenue* cases, manifestly confers no jurisdiction whatever on said Court, in proceedings against *Real Estate*, under the *Confiscation* act of July 17, 1862.

II. The rulings of the said District Court, in *refusing* to allow the said claimants to file their claims to the property libelled—*refusing* to allow them to file a plea to the jurisdiction of the Court—*refusing* to permit them to *appear* and show cause why the property libelled should not be condemned as forfeited, and in *refusing* to sign bills of exceptions to the said rulings, (Record, p. 12,) were in palpable violation of the rights of the claimants, and are grossly repugnant to the fundamental principles of our jurisprudence, as well as to the settled practice of the Courts.

This proposition seems so obvious, that no argument or citation of authorities in support thereof, is deemed necessary in this Court.

III. The said District Court, as a Court of *Admiralty*, had no jurisdiction of the subject. The doctrine is well-settled, that in the trial of all cases of seizure on *Land*, the Court sits as a Court of *Common Law*, and that in all cases at common law, the trial must be by *Jury*. This was a case of seizure on land, and the District Court, therefore, erred in trying the cause upon testimony taken before a Commissioner, and without the intervention of a jury.

The 7th section of the confiscation act of July 17, 1862, provides that the proceedings in Court, to secure the condemnation and sale of any property seized under said act, shall be *in rem*, and "shall conform *as nearly as may be*, to proceedings in *admiralty or revenue cases*."

The "proceedings in admiralty or revenue cases," to which reference is made in the act, are obviously the "proceedings" in the course of practice adopted by the District Courts of the United States, in cases of seizure where the proceedings are *in rem*.

By the Judiciary act, these Courts are invested with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation and trade of the United States, where the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burden, within their respective Districts, as well as upon the high seas; and, also, of all seizures on land or other waters than as aforesaid, made under the laws of the United States. According to the judicial constructions which, at an early period, were given to this enactment, seizures of the *first* above mentioned description, are of *Admiralty* jurisdiction, and those of the *second* description, of *Common Law* jurisdiction. Suits *in rem*, in these cases, are, therefore, instituted on the admiralty side, or the common law side, of the Court, according to the *locality* of the seizure.—(Conkling's Treatise, title Practice in Cases of Seizure, 453, 456.)

When the seizure has been made on *Land*, or on waters not so navigable, it is of *Common Law*, or as is frequently said, of Exchequer jurisdiction, and the suit is instituted by what is technically called an *Information*.—(Conk. Tr., 512. And see note.) And in such cases, the plea on the part of the claimant, or defence, on a traverse of the facts alleged in the information, concludes to the *Country*, and the issue is completed by adding the *Similiter*.—(Conk. Tr., 546.)

When the proceeding is on the exchequer or *Common Law* side of the Court, the trial is conducted in the same manner, and is subject to the same incidents, as an *ordi-*

nary personal action.—(Conk. Tr., 557.) And *all issues of fact* are tried by *Jury.*—(8 Wheaton, 391.)

In the case of The Sarah, (8 Wheaton, 391,) Chief Justice Marshall delivering the opinion of this Court, says:

"By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of ten tons burden and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of The Vengeance, reported in 3 Dallas's Rep. 297; The Sally, in 2 Cranch's Rep. 406; and The Betsy and Charlotte, in 4 Cranch's Rep. 443; that the trial is to be by the court.

"Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended than a court of chancery with a court of common law."

In the case of Clark *vs.* The United States, (2 Washington's Circuit Court Reports, 519,) it was held that the 9th section of the Judiciary act of 1789, assigns to the *Common Law* side of the District Courts, all cases of seizures on *Land*, arising under the laws of impost, navigation and trade.

The 7th article of the amendments to the Constitution of the United States, declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

This Court, in the case of Parsons *vs.* Bedford, (3 Peters, 433,) decided that "in a just sense, this amendment to the Constitution may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the *peculiar form* which they may assume to settle legal rights."

IV. The said Court decreed that *one-half* of the proceeds arising from the sale of said real estate, *after deducting and paying all fees and costs*, should be paid to the United States Marshal, as "*informant;*" whereas the act of July 17, 1862, under which the said proceedings were had, does not authorize the payment of any portion of the proceeds of such sale to an *informant*, but, on the contrary, expressly provides in the 7th section, that such proceeds "shall be paid into the Treasury of the United States," for the purposes specified in said act.

It is believed that a record has rarely been before this Court, exhibiting on the part of the Court trying the cause, a more palpable disregard of the rights of parties, and of settled principles of law, than is presented in the proceedings of the said District Court, in this case.

The decision of the said Supreme Court, reversing the judgment and decree of the said District Court, it is insisted, is plainly right, and should be affirmed.

ROBERT LEECH,
Counsel for Appellees.